STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CURTIS EMMANUEL SMITH, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

CURTIS EMMANUEL SMITH,

Respondent-Appellant.

UNPUBLISHED
March 2, 2006

No. 256490
Wayne Circuit Court
Family Division
LC No. 03-422652

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Respondent, a juvenile, was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and two counts of carjacking, MCL 750.529a(1). He was committed to the custody of the state until the age of 19, with an option to continue the commitment until the age of 21. We affirm in part, vacate in part, and remand for modification of the order of disposition to reflect a single conviction of carjacking.

Respondent first argues that the evidence at trial was insufficient to show that he aided and abetted the commission of felony murder during the course of a carjacking. We note, however, that respondent does not challenge the sufficiency of evidence to support that a carjacking resulting in death occurred, but rather only the evidence to support that he participated in that event and that he did so with the requisite intent to sustain a felony murder conviction. We find no such inadequacy of evidence.

The sufficiency of evidence to support a conviction is evaluated by reviewing the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). The resolution of credibility disputes is within the exclusive province of the trier of fact, which may draw reasonable inferences from the evidence. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

To convict a person of aiding and abetting a crime, a prosecutor must show that the crime charged was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the crime, and that the defendant intended the commission of the crime or had knowledge of the other's intent at that time he gave the aid and encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). The intent required to support a conviction of felony murder is the malicious intent required for a conviction of second-degree murder. See *People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991). Thus, to convict a defendant of felony murder on a theory of aiding and abetting, "it . . . must be shown that the [defendant] had the intent to kill, the intent to cause great bodily harm or wantonly and wilfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm" at the time he encouraged or otherwise participated in the offense on which the charge of felony murder is predicated. *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985); see also *People v Barrera*, 451 Mich 261, 294-295; 547 NW2d 280 (1996). Because the facts and circumstances of a killing may give rise to an inference of malice, a jury may infer such intent from the use of a deadly weapon in the commission of the underlying crime. *Flowers*, *supra* at 176-177; see also *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999) and *People v Turner*, 213 Mich App 558, 567, 572; 540 NW2d 728 (1995), overruled in part on other grounds in *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001).

Here, Kisha Walker testified at trial that respondent was standing next to Masada King when King approached the car in which she and Curtis Foster were sitting, pointed a gun at Foster's head, and demanded that Foster get out of the car. Walker testified that she recognized respondent because she had seen the police stop him earlier that day at the corner of her block, and that, after Foster got out of the car, respondent ran around the vehicle, ordered her to get out, demanded her money, then searched her pockets. Moments later, Foster attempted to run from the car and was shot by King in the presence of both Walker and respondent. Foster's car was then taken by King, respondent, or both.

Viewed in a light most favorable to the prosecution, Walker's testimony was sufficient to identify respondent as a participant in the underlying felony of carjacking. Her testimony that King visibly pointed a gun at Foster's head, after which respondent ran to the passenger side of the car and demanded that Walker get out of the car and give him her money, similarly supports an inference that respondent participated in the crime with knowledge that King was armed with a gun. Because malice is a permissible inference from the use of a deadly weapon, we find that the evidence was sufficient to support respondent's felony murder conviction. *Turner*, *supra*.

Respondent next argues that his defense counsel was ineffective. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because the trial court held a *Ginther*[1] hearing, we review its factual findings for clear error. *Id*. Our review of the trial court's constitutional determinations, however, is de novo. *Id*.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made errors so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). In doing so, however, the defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy, and must further show that he has been prejudiced by the error in question, i.e., that the error made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314. Where counsel's conduct involves a choice of strategies, it is not deficient. *LaVearn*, *supra* at 216. Thus, "every effort (must) be made to eliminate the distorting effects of hindsight." *Id*., quoting *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Respondent first argues that his counsel was ineffective because he failed to request a cautionary instruction regarding the inherent unreliability of accomplice testimony, specifically, that of Masada King. However, whether to request a cautionary instruction is generally a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). Here, defense counsel testified at the *Ginther* hearing that he did not request a cautionary instruction regarding accomplice testimony because the theory of defense presented by him at trial was one of alibi, i.e., that respondent was not present at the scene of the crime, but was elsewhere, and was thus an accomplice to nothing. Given the evidence to support that defense, we find this to be a reasonable strategy that, although ultimately unsuccessful, we will not second guess on appeal. *LaVearn*, *supra*; see also *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

Additionally, we note that the record indicates that counsel for respondent went to considerable lengths to obtain King's testimony and that although King did not testify as counsel expected, he did testify that he did not see respondent on the day of the offense. Such testimony was favorable to respondent in light of Walker's testimony identifying King as the armed perpetrator. Because a cautionary instruction might have undermined King's credibility and also undermined respondent's principal alibi defense by subtly portraying respondent as an accomplice, we find that respondent has failed to overcome the presumption that counsel made a reasonable strategy decision by declining to request the cautionary instruction.

Defense counsel's decision not to call respondent to testify was also a matter of trial strategy, see *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002), the practicality of which respondent has failed to demonstrate was unsound, *LaVearn*, *supra*. Contrary to defendant's assertion, an on-the-record waiver of respondent's right to testify was not required. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Further, because respondent did not testify at the *Ginther* hearing, there is no record of his proposed testimony and, therefore, no basis for concluding that respondent was prejudiced by his failure to testify. See, e.g., *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990).

There is similarly no basis from which to conclude that counsel's failure to challenge Walker's photographic identification of respondent affected the outcome of the proceedings. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Here, the record discloses that during the crime, respondent recognized respondent as the same person she saw earlier in

the day. Walker also recognized respondent on his bicycle shortly after the crime and pointed him out to the police. This all occurred before Walker was shown a photograph of respondent. Because the record clearly establishes a basis for Walker's identification of respondent independent from the photograph, a motion to suppress would have been futile and, in any event, would not have precluded Walker's in-court identification. See *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1988). Therefore, we agree with the trial court that defense counsel was not ineffective for failing to seek suppression of Walker's photographic identification. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000) (an attorney is not ineffective for failing to make a futile objection).

In deciding that there was nothing to be gained by requesting a continuance so that Jamal Davis could locate the original videotape of respondent's radio appearance on the night of the killing, defense counsel similarly made a strategy decision. Respondent has failed to show that Davis could have produced the original videotape, or more importantly, that it contained any indication of the date and time of respondent's radio appearance, which other witnesses had already set forth and corroborated for the jury. Consequently, respondent has failed to show that counsel committed a serious error, or that producing the tape might have affected the outcome of respondent's trial.

We further conclude that the trial court did not clearly err in finding that respondent's statement to the police while seated in a patrol car was made spontaneously, and was not the result of police questioning. *LeBlanc, supra*. Thus, we agree with the trial court that respondent has failed to show that there were grounds to suppress the statement. See *People v Raper*, 222 Mich App 475, 479-480; 563 NW2d 709 (1997). Counsel was not, therefore, ineffective for failing to challenge the admissibility of the statement.[2] *Kulpinski, supra*.

Lastly, respondent argues that his dual convictions for felony murder and carjacking violate his double jeopardy protections. Because respondent did not raise this double jeopardy issue below, we review the issue for plain error affecting respondent's substantial rights. *Carines, supra* at 763-764. Whether double jeopardy applies is a question of law that is reviewed de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

As previously discussed, respondent's felony murder conviction arises from the murder of Curtis Foster during the perpetration of a carjacking. However, respondent was also convicted of one count of carjacking arising from the carjacking of Foster. Because the Double Jeopardy Clause prohibits dual convictions and sentences for both felony murder and the underlying felony, *People v Harding*, 443 Mich 693, 710-712, 714; 506 NW2d 482 (1993), respondent's dual convictions amount to plain error affecting his substantial rights. The remedy is to vacate the conviction and sentence for the underlying felony. *Id*. Accordingly, we vacate respondent's carjacking conviction arising from the carjacking of Curtis Foster. *People v Akins*, 259 Mich App 545, 567-568; 675 NW2d 863 (2003). Respondent's carjacking conviction

[2] In light of the foregoing, there is no merit to respondent's argument that the cumulative effect of several errors by defense counsel denied him a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

involving Kisha Walker, however, does not offend double jeopardy principles and, therefore, may stand.

Affirmed in part, vacated in part, and remanded for modification of the order of disposition to reflect a single conviction of carjacking. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens